***United States Court of Appeals***

***for the Second Circuit***

# BRIEF FOR APPELLEE

ORIGINAL

# 77-2020

*Argued by*
W. RUSSELL CORKER

# United States Court of Appeals

**For the Second Circuit**

JOSEPH JOHN BUTLER,

*Petitioner-Appellant,*

*against*

ROY F. BOMBARD,
Greenhaven Correctional Facility,

*Respondent-Appellee.*

**On Appeal from the United States District Court for the Eastern District of New York**

## BRIEF FOR RESPONDENT-APPELLEE


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# United States Court of Appeals

**For the Second Circuit**

**Docket No. 77-2020**

JOSEPH JOHN BUTLER,

*Petitioner-Appellant,*

*against*

ROY F. BOMBARD,
Greenhaven Correctional Facility,

*Respondent-Appellee.*

**On Appeal from the United States District Court for the Eastern District of New York**

## BRIEF FOR RESPONDENT-APPELLEE

### Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (PRATT, J.), entered December 8, 1976, dismissing petitioner Joseph John Butler's petition for a writ of habeas corpus pursuant to 28 U.S.C.A. §2254. A notice of appeal was served on or about December 17, 1976, and a certificate of probable cause was granted by Judge PRATT on January 4, 1977.

The writ was directed to a judgment of the County Court of Nassau County (TOMSON, J.), rendered on June 1, 1973, which convicted Butler, after a jury trial, of burglary in the third degree (N.Y. Penal Law §140.20), and sentenced him to an indeterminate term of imprisonment not to exceed five years.

## Opinions in the Case

The judgment of conviction in the County Court of Nassau County is unreported. The Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, unanimously affirmed the judgment, with an opinion. *People* v. *Butler,* 44 A.D.2d 423 (1974). That order of the Appellate Division, was unanimously affirmed, without opinion, by the Court of Appeals of the State of New York. *People* v. *Butler,* 36 N.Y.2d 990 (1975).

The opinion and order of Judge PRATT denying the petition are unreported (see A1-A6*, No. 76 C 1126).

## Issues Presented

1. Whether the Double Jeopardy clause was violated by prosecuting Butler in Nassau County, New York, for a burglary of a dwelling located in Nassau County after first prosecuting him in Suffolk County, New York, for possession in Suffolk County of property stolen in the burglary.

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* Numbered references, preceded by an "A", are to the Appendix.

2. Whether the evidentiary rule—that if a person is found in possession of recently stolen property of which he can give no reasonable account, a jury may conclude that he committed the theft, and if the theft were through a "burglarized taking," that he was the burglar—violated, on the facts of this case, defendant's due process rights.

## Statement of the Case

The facts, as found, in part, by the Appellate Division, are as follows:

> "The defendant was stopped for speeding on April 3, 1972 at approximately 11:00 P.M. near Hauppauge in Suffolk County. Upon examination, it appeared to the police officer that the license proffered by the defendant was forged. This was confirmed by a radio check and the defendant was forthwith placed under arrest for possessing a forged driver's license. The officer had noticed that the vehicle was very low to the ground and closer inspection after the arrest disclosed several large tool boxes on the rear seat. After receiving the *Miranda* warnings, the defendant told the officer, first, that he did not know to whom the tools belonged, and then, that he thought they belonged to an unidentified passenger whom the officer had seen fleeing from the vehicle after it stopped. Taken to police headquarters, the defendant was again questioned by police and his vehicle was impounded. The Suffolk County Police regulations required an inventory of the contents of the impounded vehicle. Until this point, the police were unaware of any burglary.
>
> "At the police station, it took several police officers approximately two hours to empty the vehicle

of its contents and to prepare an inventory. They removed seven large tool boxes from the rear seat and a battery charger and a wheel balancer from the trunk. The tool boxes were stacked to within eight inches of the roof and obscured a driver's view through the rear window. Three of the tool boxes weighed about 250 pounds each, one about 150 pounds and two others about 50 pounds each. The police found a name, address and telephone number in one of the tool boxes. Subsequent inquiry disclosed that the person whose name was in the box was its owner; that he worked at Holy Rood Cemetery at Westbury in Nassau County; that he had left the tool box in a tool shed at the cemetery at 5:30 that afternoon; and that sometime later the cemetery gate was forced open and the tool shed burglarized and seven tool boxes, a battery charger and a wheel balancer were taken from the shed. These were the articles found in the defendant's vehicle. The defendant did not deny being in possession of stolen property but did deny that he was the burglar.

"The defendant told the police at the police station, after again receiving the *Miranda* warnings, that he had been in Westbury earlier in the evening, had stopped at a diner for coffee and there met a man who offered him money to transport both him and the tools to an undisclosed place in Suffolk County. The defendant at first stated he did not know the man's name, but later remembered that his name was Callahan and that he resided in Nassau County. In one version, the defendant told the police that this man was an old friend whom he had known in prior years when he resided in the Westbury area. The defendant also told the police that he had agreed to transport the man and the tools to Suffolk County, that the two of them transferred the tools from the

man's vehicle to his own and that they thereupon left the man's allegedly disabled vehicle in the diner's parking lot. The defendant told one officer that he knew that the tools were 'hot.'

"Police investigation failed to uncover either a man named Callahan residing in the Westbury area who owned an automobile which fit the description of that given by the defendant or the automobile itself parked where the defendant stated he had last seen it. The man seen leaving the scene of the defendant's arrest, despite an immediate police search, was not found." 44 A.D.2d 423, 424-25.

The following day, April 4, 1972, petitioner was charged in Suffolk County with the crimes of criminal possession of stolen property in the second degree and possession of a forged instrument.

On April 17, 1972, petitioner pleaded guilty in the District Court of Suffolk County (COPERTINO, J.) to criminal possession of stolen property in the third degree, and possession of a forged license (Minutes of Trial, pp. 290-291, 294-295, 300-301).

On November 9, 1972, the Nassau County Grand Jury indicted him for the crimes of burglary (of the premises from which the property was stolen) in the third degree and grand larceny in the second degree. On December 13, 1972, petitioner moved in the Nassau County Court to dismiss the indictment. On February 21, 1973, the court granted petitioner's motion to the extent of dismissing the grand larceny count, on the ground that petitioner had previously been convicted of criminal possession of the stolen property and that a then existing provision of the Penal Law [§165.60 (2), repealed by the Laws of New York, 1976, ch. 375] pre-

cluded a conviction of both larceny and criminal possession of the stolen property.

Petitioner then renewed his motion to dismiss the burglary count, citing N.Y. Criminal Procedure Law §40.20 (1), which provides: "A person may not be twice prosecuted for the same offense." The motion was denied.

Petitioner was tried and convicted of the burglary; and the judgment was affirmed on appeal. *People* v. *Butler, supra,* 44 A.D.2d 423 (2d Dept. 1974) *affd.* 36 N.Y.2d 990 (1975).

## POINT I

### Petitioner was not twice placed in jeopardy.

Found in Suffolk County, New York, in actual physical possession of property stolen a few hours earlier from a burglarized premises located in Nassau County, New York, petitioner was first charged and convicted in Suffolk County of criminal possession of stolen property. Thereafter petitioner was tried and convicted in Nassau County of burglary of the premises from which the stolen property had been taken.

That scenario was in accord with New York's law that specifically defines and limits the geographical jurisdiction of offenses in its criminal courts (N.Y. CPL, art. 20). Pursuant to that law Nassau County was precluded from prosecuting Butler for his actual possession of the stolen property in Suffolk County. Suffolk County was precluded from prosecuting Butler for the burglary.

In the Nassau County Court and in the Appellate Division petitioner's unsuccessful attempt to have the burglary charge dismissed was based on a claim that he was being twice prosecuted for the "same offense." New York CPL 40.20(1). In the New York Court of Appeals double jeopardy was for the first time also claimed violated pursuant to the "same transaction" test proposed by Justice William Brennan in his concurring opinion in *Ashe* v. *Swenson,* 397 U.S. 436 (1970).

In order to support a claim of violation of double jeopardy under the federal constitution it must be shown that the offenses charged were in law and fact the "same offense." *United States* v. *McCall,* 489 F.2d 359 (2d Cir. 1973). It is well established that offenses are not the same merely because they arise out of the same course of criminal conduct; "they are the same only when the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other." *Blockburger* v. *United States,* 284 U.S. 299 (1932); *United States* v. *Kramer,* 289 F.2d 909, 913 (2d Cir. 1961). The "same transaction" test, proposed by Justice Brennan in *Ashe* v. *Swenson, supra* at 448 (1970), and urged upon this Court by petitioner, has never been adopted by a majority of the Supreme Court. *United States* v. *Garner,* 529 F.2d 962, 971 (6th Cir. 1971).

In *Garner,* the defendant, in the United States District Court in South Carolina, pleaded guilty to conspiracy to transport stolen securities in interstate commerce. The same stolen securities (U. S. Savings Bonds) were the subject of a separate conviction, in the United States District Court in Tennessee, of conspiracy to forge endorse-

ments on the savings bonds. The Court noted that it was "not relevant for purposes of Double Jeopardy Clause that both indictments arose out of the same criminal episode." *Id.*, at 971. Further, in discussing and rejecting the "same transaction test" proposed by Mr. Justice Brennan in *Ashe* v. *Swenson, supra,* the Sixth Circuit went on to note that the Supreme Court has never adopted a rule of compulsory joinder as a constitutional requirement. *United States* v. *Garner, supra,* at 971.

In *Johnson* v. *Russell,* 420 F.2d 697 (6th Cir. 1970), defendant appealed from a denial of a writ of habeas corpus, contending that having been acquitted on the counts charging larceny of three automobiles, he could not, consistent with the double jeopardy clause, be convicted of receiving and concealing the same automobiles. That court rejected appellant's Fifth and Fourteenth Amendment claims, since the offenses were separate and distinct under Tennessee law.

The "same evidence test" formulated in *Blockburger* v. *United States, supra,* is still the controlling standard in deciding when a defendant has twice been placed in jeopardy. Petitioner does not suggest, as well he could not, that burglary and possessing stolen property are the "same offense"; the elements of each crime are distinguishable, each requiring proof of a fact which the other does not. *United States* v. *Kramer, supra* at 913 (2d Cir. 1961) (prior acquittal for burglary in United States District Court in Connecticut did not preclude subsequent conviction in New York for possession of proceeds of the burglary, albeit the court reversed on other grounds). *See United States* v.

*Bruni*, 359 F.2d 807 (7th Cir. 1966) (conviction of defendant, in Wisconsin Federal District Court, for substantive offenses of passing counterfeit federal reserve notes did not bar subsequent conviction in Illinois Federal District Court for possession of counterfeit reserve notes and printing plates); *Smith* v. *Gaffney*, 462 F.2d 663 (10th Cir. 1972) (defendant not twice placed in jeopardy for the same criminal act and intent by being convicted, under two separate state statutes, of both burglary and larceny); *United States* v. *Lee*, 454 F.2d 190, 191 (9th Cir. 1972) (rejecting "same transaction test"); *United States* v. *Cioffi*, 487 F.2d 492 (2d Cir. 1973) (discussing and rejecting "same transaction test").

Consequently, since each crime charged required proof of facts which the other did not, and since each crime was committed in separate jurisdictions within New York, each jurisdiction precluded by State law from prosecuting the offense not committed within its geographical jurisdiction, there was no violation in this case of the Double Jeopardy clause of the Fifth Amendment.

## POINT II

**The evidentiary inference of guilt from the recent and unexplained possession of the fruits of the crime is consistent with due process.**

Petitioner was convicted of burglary in the third degree (New York Penal Law §140.20). This conviction concededly rested in part upon an application of the rule established by the New York Court of Appeals in *Knickerbocker* v. *People*, 43 N.Y. 177 (1870), which in essence

provides that if a person is found in possession of recently stolen property of which he can give no reasonable account, a jury may conclude that he committed the theft, and if the theft were through a "burglarious taking," that he was the burglar.

In the instant petition for habeas corpus, petitioner argues that, while possession of property recently stolen may justify an inference that the possessor of the stolen property knew they were stolen, recent possession affords no support for an inference that he committed the burglary. Accordingly, petitioner argues, the *Knickerbocker* rule as applied to burglaries fails to meet due process requirements. Petitioner's argument lacks merit, as this Court has held. *United States* v. *Coppola*, 424 F.2d 991, 993 (1970).

Initially, petitioner failed to take any exception to the specific portion of the trial court's charge to the jury here complained of. Thus, the charge point was not properly preserved as a question of law for review in New York's courts. Indeed, a review of the claim presented to the state courts reveals that at no time did petitioner raise the constitutionality claim now urged in the instant habeas corpus petition, but, merely, argued the application of the *Knickerbocker* rule to the facts of the case. *People* v. *Butler*, 44 A.D.2d 423 (2d Dept. 1974), *aff'd*, 36 N.Y.2d 990 (1975). Thus, petitioner has failed to exhaust his state remedies. 28 U.S.C.A. §2254; *Picard* v. *Connor*, 404 U.S. 270 (1971); *Daneff* v. *Henderson*, 501 F. 2d 1180 (2d Cir. 1974). In any event, petitioner is wrong on the merits.

The trial court's instruction here challenged states a permissible inference, the constitutionality of which must be tested under standards delineated by the Supreme Court. An inference will be rejected as violative of due process "unless it can at least be said with substantial assurance that the presumed fact is 'more likely than not' to flow from the proved fact in which it is made to depend." *Leary* v. *United States,* 395 U.S. 9, 36 (1969). Whether the inference must also satisfy the "beyond a reasonable doubt" test established in *In re Winship,* 397 U.S. 358, 364 (1970), is a question yet to be decided in the area of presumptions and inferences. *See, Barnes* v. *United States,* 412 U.S. 837, 841-46 (1973); *Turner* v. *United States,* 396 U.S. 398, 416, 419 (1970); *Leary* v. *United States, supra,* at 36, n. 64. But, under the most stringent formulation of the test (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) the here challenged inference accords with due process. *Cf. Barnes* v. *United States, supra,* at 2362.

The argument, possession of recently stolen property can not constitutionally give rise to an inference that the possessor participated in the burglary, while often advanced, has always been rejected by any jurisdiction confronted with the issue. Thus, as early as 1913, in *McNamara* v. *Henkel,* 226 U.S. 520, 524-525 (1913), the Supreme Court recognized that possession of recently stolen goods supports an inference not merely of guilty knowledge, but of participation in the theft.* As has often been

* In support of this proposition, the Court cited, *inter alia, People* v. *Knickerbocker, supra.*

noted, instructions identical to the one employed in the instant case do no more than accord the evidence its natural probative force, "that is, it is merely an articulation of a reasoning process which the jury may legitimately employ to identify the person who committed an offense." *McNamara* v. *Henkel, supra,* at 525.

Indeed, possession of recently stolen goods as supporting an inference that the possessor was the burglar is the prevailing rule in the Second Circuit, its application being recently endorsed in *United States* v. *Coppola, supra,* 424 F. 2d 991, 993 (2d Cir. 1970)—(Where the Court rejected the identical argument now pressed on this Court); *accord, United States* v. *DeSisto,* 329 F. 2d 929 (2d Cir. 1964); *United States* v. *Keylor,* 491 F. 2d 1127, 1131 (2d Cir. 1973); *United States* v. *Barlow,* 470 F. 2d 1245, 1254 (D. C. Cir. 1972); *United States* v. *Fench,* 470 F. 2d 1234 (D. C. Cir. 1972); *United States* v. *Carter,* 522 F. 2d 666 (D. C. Cir. 1975); *See also,* Devit and Blackman, *Federal Jury Practice and Instructions,* §13.12 (2d ed. 1970, Supp. 1974)—where a charge similar to the one here challenged is approved.

Moreover, the instant case was a proper one for drawing the inference that petitioner actually participated in the burglary. Indeed, the Appellate Division, in affirming petitioner's conviction, *supra,* at 429, noted that the facts fairly compel the conclusion that petitioner was one of the thieves. Particularly, the weight of the items taken, petitioner's apprehension with the stolen items in his possession several hours after the commission of the crime, several miles from the scene of the theft; his acknowledged presence in the vicinity of the crime scene

earlier that evening, and petitioner's several varied and inconsistent stories, were clearly sufficient to enable the jury to find beyond a reasonable doubt that petitioner participated in the burglary. Since the inference thus satisfies the reasonable doubt standard, the most stringent standard the Supreme Court has applied in judging permissive criminal law inferences, it satisfies the requirements of due process.

## Conclusion

***The order of the District Court should be affirmed.***

Respectfully submitted,

DENIS DILLON
District Attorney, Nassau County
*Attorney for Respondent-Appellee*

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March, 1977

**Affidavit of Service by Mail**

**In re:** 5952

Joseph John Butler v. Roy F. Bonbard

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on MAR 18 1977, 197..., he served 3 copies of the within Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

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and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

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Harry Minott

Sworn to before me this 18th day of March 1977

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
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